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 9

10 **IN THE UNITED STATES DISTRICT COURT**  
 11 **FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

12 ENOCH ADAMS, JR., LEROY ADAMS,  
 13 ANDREW KOENIG, JERRY NORTON  
 DAVID SWAN and JOSEPH SWAN,

14

Plaintiffs,

15

v.

16

TECK COMINCO ALASKA INCORPORATED

17

Defendant.

18

19

NANA REGIONAL CORPORATION and  
 NORTHWEST ARCTIC BOROUGH,

20

Intervenors-Defendants.

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Plaintiffs Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, and Joseph Swan (collectively "Adams") move for leave to file a Supplemental Complaint in order to add additional violations of the Clean Water Act by the Defendant Teck Cominco Alaska Incorporated. Pursuant to Fed.R.Civ.P. 15(d), Adams may supplement the complaint if transactions, occurrences or events took place since the date of pleading sought to be

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Case No. A04-49 (JWS)

**MEMORANDUM OF POINTS &  
 AUTHORITIES IN SUPPORT  
 OF MOTION FOR LEAVE TO  
 FILE SUPPLEMENTAL  
 COMPLAINT**

F.R.C.P. Rule 15(d)

1 supplemented. The proposed supplemented complaint is attached as Exhibit 1. Adams  
 2 respectfully requests leave to file the Supplemental Complaint on October 8, 2007, when the 60-  
 3 day notice period has run. (Adams had planned to file this Motion when the 60-day notice period  
 4 ran in October, but files today to meet the deadline in the Court's Order of August 9, 2007  
 5 [Docket 167].)

6 Plaintiffs facing further violations by a defendant in a Clean Water Act suit have two  
 7 ways of dealing with those violations after providing notice to the polluter: filing a new lawsuit,  
 8 or amending their complaint to include the continued violations. In the interest of litigant and  
 9 judicial economy, Adams here would like to proceed by the latter course, having provided the  
 10 requisite notice to Teck Cominco.

11 **I. ADAMS' ORIGINAL 60-DAY NOTICE LETTER SATISFIED THE NOTICE  
 12 REQUIREMENTS OF THE CLEAN WATER ACT.**

13 Adams has met all conditions precedent to supplementing this suit and could request  
 14 leave to file the Supplemental Complaint today. However, in an abundance of caution, Adams  
 15 has sent an updated 60-day notice letter to Teck Cominco, although under Ninth Circuit law  
 16 Adams need not have.

17 After the initiation of this citizen suit to enforce the Clean Water Act, Adams learned that  
 18 Teck Cominco continued to violate its total dissolved solids (TDS) end-of-pipe limits after the  
 19 litigation began. Indeed, Adams used that fact to demonstrate that the violations were "ongoing"  
 20 at the summary judgment stage. Teck Cominco objected to Adams' listing such allegations in  
 21 the Motion for Partial Summary Judgment by stating that, "plaintiffs failed to allege any  
 22 violations of the 3900 mg/L limit in their Complaint or in their 60-day letter." *See* Opposition to  
 23 Plaintiff's Motion for Partial Summary Judgment (Docket 100) at 27.

24 Teck Cominco's protestations were misplaced. Courts have allowed plaintiffs to prove  
 25 violations of the Clean Water Act at trial even though such violations were not mentioned in the  
 26 60-day notice letter. In *Community Association for Restoration of the Environment v. Henry  
 27 Bosma Dairy*, 305 F.3d 943, 953 (9<sup>th</sup> Cir. 2002), the Ninth Circuit held that a 60-day notice  
 28

1 satisfies 33 U.S.C. §1365(b) of the Clean Water Act even if it fails to list every known violation  
 2 later alleged at trial. Based on the Third Circuit's reasoning in *Public Interest Research Group v.*  
 3 *Hercules, Inc.*, 50 F.3d 1239, 1248 (3<sup>rd</sup> Cir. 1995), the *Bosma* court further held that under 33  
 4 U.S.C. §1365, the Clean Water Act does not require a plaintiff to give notice to defendant of  
 5 each individual violation, but rather plaintiffs can include additional violations in a suit when  
 6 they are discovered, even though such violations were not included in the 60-day notice. *Id.*; *see also*  
 7 *Waterkeepers N.Ca. v. AG Industrial Manufacturing*, 375 F.3d 913, 917-918 (9<sup>th</sup> Cir. 2004);  
 8 *San Francisco Baykeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1159 (9<sup>th</sup> Cir. 2002). Thus,  
 9 Plaintiff's original 60-day notice letter is sufficient to raise at trial additional violations of the  
 10 same permit parameter by Teck Cominco.

11 However, Adams has also served Teck Cominco with a supplemental 60-day notice letter,  
 12 outlining the more than 770 violations discovered since the 60-day notice letter upon which this  
 13 suit was based. Served on August 8, 2007, this notice letter (attached to the Supplemental  
 14 Complaint) sets forth the violations of the TDS daily and monthly permit limits, the cyanide daily  
 15 and monthly permit limits, and the whole effluent toxicity (WET) permit limits. This includes  
 16 398 additional daily TDS violations, 173 additional monthly TDS violations, 19 additional daily  
 17 cyanide violations, 181 additional monthly cyanide violations, and one additional WET violation.  
 18 The 60-day notice period will run on October 7, 2007, and thus Adams requests leave to file the  
 19 Supplemental Complaint on or after October 8, 2007.

20 **II. ADAMS HAS MET THE PROVISIONS OF F.R.C.P. RULE 15(d).**

21 Fed.R.Civ.P. 15(d) allows a party, upon reasonable notice, to supplement pleadings upon  
 22 motion to the court if such terms are just and set forth transactions, occurrences, or events which  
 23 occurred since the date of the original pleading. The Ninth Circuit has held that supplemental  
 24 pleadings are to be liberally allowed because they avoid piecemeal litigation. *Keith v. Volpe*, 858  
 25 F.2d 467, 473 (9<sup>th</sup> Cir. 1988), cert. denied, 493 U.S. 813 (1989). Here, such supplementation  
 26 directly avoids piecemeal litigation as in the absence of it, Adams would be forced to file a  
 27 wholly separate suit to prosecute the additional 770 violations, and either proceed independently  
 28

1 with that suit or move to consolidate it with this suit.

2 As discussed above, Adams satisfied the 60-day notice requirements of 33 U.S.C.  
 3 §1365(b). Furthermore, the additional facts alleged occurred or were discovered after the  
 4 Complaint was filed, and Adams merely updates the action so as to bring relevant new claims  
 5 based on these facts within the Court's jurisdiction. *Keith v. Volpe*, 858 F.2d at 473-474. The  
 6 new claims are closely related to the original action – they are all simply further violations of the  
 7 same permit parameters already previously violated and at issue in this suit – and they present the  
 8 same fundamental issues: violations of Section 33 U.S.C. §1311 of the Clean Water Act by  
 9 failing to comply with discharge limitations for TDS daily, TDS monthly, cyanide daily, cyanide  
 10 monthly and WET.

11 Leave to supplement should be liberally granted, “unless undue prejudice to the opposing  
 12 party will result.” *LaSalvie v. United Dairymen of Arizona*, 804 F.2d 1113, 1119 (9<sup>th</sup> Cir. 1986),  
 13 cert. denied, 482 U.S. 928 (1987). Here, Defendants are not prejudiced by the supplemental  
 14 pleading, which raises legal issues identical to those already before the Court. Moreover,  
 15 adjudication of Adams’ rights cannot be complete without the Court’s addressing Teck  
 16 Cominco’s additional violations.

17 For the foregoing reasons, Adams respectfully requests that the Court grant Adams’ leave  
 18 to file the proposed Supplemental Pleading and thereby add the new claims.

19 **III. THE SUPPLEMENTAL MATERIAL MERELY UPDATES THE ALREADY  
 20 ALLEGED VIOLATIONS.**

21 Adams here lists, in their entirety, the proposed additional language to be added to the  
 22 Complaint through this supplement:

23 **Paragraph 14, after the existing text:** Pursuant to Section 505(b)(A) of the Act, 33  
 24 U.S.C. § 1365(b)(1)(A), on August 8, 2007, Enoch Adams, Jr., Leroy Adams, Andrew Koenig,  
 25 Jerry Norton and Joseph Swan gave supplemental notice of further violations sixty days prior to  
 26 the filing of this Supplemental Complaint to the same nine persons. A true and correct copy of  
 27 this Supplemental Notice Letter is attached to this Complaint as Exhibit B.

28

1           **Paragraph 32, after the existing text:** As of June 15, 2004, the daily TDS permit limit  
 2 is 3900 mg/L, except during Arctic Grayling spawning season when both the daily and monthly  
 3 TDS limits from the 1998 permit are in force.

4

5           **Paragraph 59, after the existing text:** In addition, by comparing discharges reported by  
 6 Teck Cominco in the mine site DMRs to the mine permit, plaintiffs documented an additional  
 7 772 violations of the mine site permit from June 1, 2003 until June 30, 2007. Plaintiffs specified  
 8 each of the 772 violations of the mine site permit in a supplemental 60-day Notice Letter  
 9 plaintiffs served on Teck Cominco on August 8, 2007. This suit also seeks relief from 574 of the  
 10 supplemental notice violations, which plaintiffs have determined to be ongoing or capable of  
 11 repetition and not alleged in the original Complaint.

12

13           **Paragraph 63:** Replace “2,309” with “2,883” for the total number of violations.

14

15           **Paragraph 64:** Add text (underlined) as follows: The regulations implementing the  
 16 Clean Water Act, 40 C.F.R. §19.4, authorize a penalty of up to \$27,500 for each violation of the  
 17 permits and Consent Orders that occurred before March 14, 2004, and \$32,500 for violations  
 18 after March 14, 2004, or up to \$82,107,500 for the violations alleged herein.

19

20           **Paragraph 70, after the existing text:**

21           **2004:** May 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and  
 22 June 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14; August 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,  
 23 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31; September 1, 2, 3, 4,  
 24 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26.

25           **2005:** May 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30  
 26 and 31; June 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25,  
 27 26, 27, 28, 29, 30; July 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,  
 28

1 23, 24, 25, 26, 27, 28, 29, 30 and 31; August 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17,  
 2 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31; September 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11,  
 3 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30; October 1, 2, 3, 4, 5  
 4 and 6.

5 **2006:** May 9, 10, 11, 12, 13, 14, 15 and 16; September 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,  
 6 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30; October 1, 2.

7 **2007:** June 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29,  
 8 and 30.

9  
 10 **Paragraph 73, after the existing text:** May 2004, June 2004, May 2005, June 2005,  
 11 May 2006, June 2006, May 2007 and June 2007.

12  
 13 **Paragraph 74, after the existing text:**

14 **2004:** May 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and  
 15 31; June 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.

16 **2005:** May 24, 25, 26, 27, 28, 29, 30, 31; June 1, 2, 3, 4, 5, 6.

17 **2006:** May 30, 31; June 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

18 **2007:** May 26, 27, 28, 29, 30 and 31; June 1, 2.

19  
 20 **Paragraph 76:** Changed numbers as follows (changes underlined): Teck Cominco has  
 21 discharged TDS in excess of its daily permit limit at least 915 times, and in excess of the  
 22 monthly average permit limit at least 688 times, for 1303 total TDS violations.

23  
 24 **Paragraph 80, after the existing text:** As specified in plaintiffs' Supplemental Notice  
 25 Letter, Teck Cominco exceeded its daily maximum permissible concentration of cyanide and  
 26 thus violated permit condition I(A)(1) for cyanide on May 10 and 13, 2003; June 17 and 24,  
 27 2003; July 1, 15, 21 and 29, 2003; August 12, 2003; May 23, 2005; August 9, 2005; September  
 28

1 5, 12, 19, 2005; October 3, 2005; May 11 and 15, 2006; June 5, 2006; October 1, 2006.

2

3 **Paragraph 83, after the existing text:** as well as in September 2005, October 2005,  
 4 May 2006, June 2006, July 2006, August 2006 and September 2006.

5

6 **Paragraph 84, after the existing text:**

7 **2005:** September 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,  
 8 23, 24, 25, 26, 27, 28, 29 and 30; October 1, 2, 3, 4, 5 and 6.

9 **2006:** May 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29,  
 10 30 and 31; June 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,  
 11 25, 26, 27, 28, 29, 30; July 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21,  
 12 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31; August 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,  
 13 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31; September 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,  
 14 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30.

15

16 **Paragraph 86:** changed numbers as follows: Teck Cominco has discharged cyanide in  
 17 excess of its daily permit limits at least 35 times, and in excess of the monthly average permit  
 18 limit at least 588 times, for 623 total cyanide violations.

19

20 **Paragraph 93, after the existing text:** As specified in plaintiffs' Supplemental Notice  
 21 Letter, Teck Cominco exceeded the maximum daily limit for WET, and thus violated mine site  
 22 permit condition I(H)(5), in August 2004.

23

24 **Paragraph 99:** changed numbers as follows: Teck Cominco has violated the permit  
 25 requirements for WET reporting at least 7 times, the permit requirements for WET daily limits at  
 26 least 9 times, and for WET monthly averages at least 199 times, for 215 total WET violations.

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28

1                   **Prayer for Relief, Paragraph 3:** changed or added text underlined: Pursuant to 33  
 2 U.S.C. §1319(d) and 40 C.F.R. § 19.4, the imposition of civil penalties of \$27,500 for each of the  
 3 2,318 violations alleged in this complaint that occurred before March 14, 2004 and \$32,500 for  
 4 each of the 565 violations alleged in this complaint that occurred after March 14, 2004, totaling  
 5 \$82,107,500.

6

7                   It should be noted that not a single paragraph number in the Complaint is changed,  
 8 making a Supplemental Answer by Teck Cominco quite easy.

9 **IV. CONCLUSION**

10                  Because Teck Cominco has continued to violate its Clean Water Act permits during the  
 11 pendency of this lawsuit, Adams must supplement the Complaint in this suit or file a new suit  
 12 and move to consolidate it. As supplementation should be liberally granted under Ninth Circuit  
 13 precedent, Adams is choosing this path and respectfully requests the right to file the  
 14 Supplemental Complaint on or after October 8, 2007.

15 Date: August 31, 2007

Respectfully submitted,

16                   CENTER ON RACE, POVERTY  
 17                   & THE ENVIRONMENT

18                   \_\_\_\_\_  
 19                   /s/ *Luke W. Cole*  
 20                   Luke W. Cole  
 21                   Nancy S. Wainwright  
 22                   Attorneys for Plaintiffs Enoch Adams et al.

23 Certificate of Service

24                  This is to certify that on the 31<sup>st</sup> day of August, 2007, a true and correct copy of the foregoing  
 25 MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT, with PROPOSED  
 26 SUPPLEMENTAL COMPLAINT was served, via electronic service, on the below identified  
 27 parties of record:

28                  Sean Halloran  
 29                   Hartig Rhodes Hoge & Lekisch, P.C.  
 30                   717 K Street  
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9  
10 /s/ Luke W. Cole  
11 Luke W. Cole  
11 Nancy S. Wainwright  
12 Attorneys for Plaintiffs Enoch Adams et al.

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